
U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON. D.C.

82-ERA-9

Charles A. Atchison
Complainant v.

Brown & Root, Inc.
Respondent

DECISION AND FINAL ORDER
Statement of the Case

Administrative Law Judge Ellin M. O'Shea submitted a Recommended Decision to me holding that Brown & Root, Inc. (Brown & Root) violated the employee protection provisions of the Energy Reorganization Act (42 U.S.C. 5851) (ERA) when it transferred and fired the complainant, Charles A. Atchison, from his job as a Quality Control Inspector on April 12, 1982. Brown & Root was the prime contractor of Texas Utilities Generating Company (TUGCO) constructing the Comanche Peak Steam Electric Station (CPSES) nuclear power plant at Glen Rose, Texas. Judge O'Shea held that Mr. Atchison had made out a prima facie case that his transfer and discharge were the result of his protected activities of filing Nonconformance Reports. Because she explicitly found that Brown & Root's stated reasons for its actions against Mr. Atchison were pretextual, the ALJ held that Mr. Atchison

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had proven that his protected activities were the sole cause of the adverse actions taken against him. She recommended that the Secretary order reinstatement of Mr. Atchison to the same position and rate of pay he held before he was fired, with back pay to the date of reinstatement and expungement of his personnel record. Judge O'Shea also recommended the award of attorney's fees of $7,875. I agree with her finding that a violation occurred; but; for the reasons discussed below, I do not think it would serve the purposes of the Act to order reinstatement or back pay beyond June 15, 1982. Therefore, the Administrative

Law Judge's recommended order is adopted in part and modified in part, as discussed below.

Facts

The facts in this case are set forth in considerable detail in the ALJ's recommended decision; I will summarize only the most salient facts here.

Charles Atchison was hired by Brown & Root to work as a documentation specialist at CPSES on February 29, 1979. No specific education or experience was required for that position. It is undisputed that Atchison misrepresented his education on his application form by stating that he had received an Associate of Arts degree from Tarrant County Junior College when in fact he had only attended courses there and had not received a degree. Each time he applied for promotion or took tests for certification in inspection techniques he repeated this misrepresentation. Moreover, when he applied for a job with TUGCO while he was still working for Brown & Root, Atchison altered a copy of a letter from Tarrant County Junior College to show that he had received a degree.

He was promoted to instructor in nondestructive examination (NDE) of welds on April 9, 1980. In the same year, he was trained for and certified as a Quality Assurance Auditor, certified as a Level II Visual Inspector and Fabricator Inspector, and certified as a Lead Auditor. He was appointed training coordinator for the training of Brown & Root inspection personnel in 1980, a position he held until he was transferred, at his own request, to field inspections in late 1981.

In November, 1981 Mr. Atchison was certified as a Level III Mechanical Equipment Inspector "for training only." (This

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meant that his functions as a Level III Inspector were limited to signing the certifications of Level II inspectors who had taken inspection training courses.) He was certified in Level II Liquid Penetrant Examinations on February 23, 1982. In the course of obtaining these promotions and certifications, Mr. Atchison took a number of exams on which he always scored in the 90's, except for an 83 on the Fabricator Inspector test. Evaluations of his performance by his supervisors were always above average, excellent or outstanding, including the evaluation given on the day he was fired as part of the termination process.

When Mr. Atchison was transferred to field inspection in late 1981, his immediate supervisor was Richard Ice and his primary responsibility was the inspection of equipment called pipe whip restraints -- large steel structures attached to the walls of various parts of the plant which restrain the motion or movement of pipes when they are put under load or pressure, or in the event of a break. At that time, this inspection function was part of the Brown & Root ASME (American Society of Mechanical

Engineers) inspection group. Mr. Ice testified that Mr. Atchison was a very thorough inspector who was relatively efficient and did a good job.

In February 1982, inspection functions were reorganized and inspection of pipe whip restraints was transferred to the supervision of TUGCO under its non-ASME inspection group. Several Brown & Root employees, including Mr. Atchison, were transferred to TUGCO's supervision, although they remained employees of Brown & Root. When he was transferred, Mr. Atchison's immediate supervisor became Randall Smith. Mr. Smith reported to Mike Foote of Ebasco Services, a subcontractor of TUGCO responsible for the non-ASME inspections. Mr. Foote, in turn, reported to C.T. Brandt of Ebasco Services who was the non-ASME Quality Control Manager at CPSES starting in February 1982.

Mr. Brandt's first contact with Mr. Atchison occurred in late 1981 when Mr. Atchison was still Brown & Root training coordinator. An acquaintance of Mr. Brandt was given a welding inspection exam by Mr. Atchison and failed. Mr. Brandt found that "incredible" because he felt the man knew a lot about welding. Mr. Brandt discussed the test score with Mr. Atchison, who had graded the test from an answer key provided to him, and formed an impression that Mr. Atchison did not know much about visual weld inspection.

Mr. Brandt next had direct dealings with Mr. Atchison in connection with a so-called "822 level" incident. In the course of inspecting installed pipe whip restraints at the 822 level in one of the buildings in March 1982, Mr. Atchison noticed what appeared to him to be defects in welds done by the company which had fabricated the restraints, several inches away from the area he was inspecting. (Mr. Atchison's assigned inspection responsibility was inspection of welds done by Brown & Root in the installation or modification of pipe whip restraints. Basic fabrication of these items was done by Chicago Bridge and Iron Company (CB&I) at its own plants.) Mr. Atchison drafted a nonconformance report (NCR) noting porosity and undercut defects and told his supervisor, Randy Smith, about it. Mr. Smith showed Atchison's drawing of the area to Mr. Brandt, and Smith, Foote and Brandt went to look at the welds. Although they were covered with paint, Brandt did not think there were porosity defects; he thought the "linear indications" were caused by the paint, but he could not concur or disagree with the finding. He said to Smith and Foote that Atchison should have the paint removed if he wanted to follow up on the question. Atchison never did, and did not follow proper procedures for issuance of an NCR on this matter. It was not actually resolved until July 1982, when Atchison's draft NCR was found. Brandt reinspected the area at that time and found that some, but not all, of the porosity reported by Atchison existed.

When he first looked at the 822 level welds in March 1982, Mr. Brandt noted what he considered to be excessive grinding or polishing of the welds on which Mr. Atchison was performing liquid penetrant inspections. Brandt took no action to correct what he felt was Atchison's improper technique.

After Brandt, Smith and Foote had looked at the 822 level welds in March 1982, Smith told Atchison that Brandt thought Atchison was inspecting beyond the scope of his responsibility by checking the supplier's welds, and that Brandt did not think they were in nonconformity. Atchison wrote a memo on a standard Brown & Root form known as a Request for Information or Clarification asking whether defects noted in work done by suppliers should be reported at all, and if so, to whom and how should they be documented. It was answered by Randy Smith who told Atchison in writing that obvious defects located outside the Brown & Root modification areas should be reported but should not be subjected to any tests.

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Later in March 1982, Atchison was asked by a craftsman supervisor to look at the welds on some pipe whip restraints which had not yet been installed. He saw some defects, marked them and told Randy Smith. After Foote and Brandt looked at the welds, Brandt ordered that an NCR be written (which became NCR No. 296) and the defects mapped. Atchison was instructed to map the defects as part of a four-man team. When this was done the first time, Brandt was dissatisfied because he felt there could not be as much porosity as shown on the map. Brandt ordered the weld defects to be mapped again; Atchison was not involved in this second mapping of defects. Brandt still felt that the second map showed too much porosity; he was irritated that it was taking so long to resolve the question of how many defects there were in these pipe whip restraints. Then Brandt learned from the supplier, CB&I, that its contract called for the use of ASME welding standards whereas Brandt had told his staff to use American Welding Society (AWS) standards in inspecting these pipe whip restraints. Brandt acknowledged his mistake and ordered the defects to be mapped again under the correct standard. Some defects were found and they were repaired by CB&I; in addition, "back-fit" inspections were done on 56 CB&I pipe whip restraints already installed.

At one point during this "NCR 296 incident" Randy Smith was asked by Brandt or Foote how it was that an inspector came to inspect welds done by CB&I, which was beyond the scope of Smith's inspectors' responsibilities. Smith explained that the craft foreman had asked Atchison to look at the welds.

At about the same time as these incidents occurred, Atchison was taking tests to obtain the certifications which he believed would qualify him for promotion to Level III Inspector. He requested Randy Smith to recommend him for a promotion, which Smith did, giving him an outstanding performance evaluation. Prior to the events of April 12, 1982, the day Atchison was fired, Brandt, who had the authority to approve promotion requests, had already informally rejected it.

In early April 1982, Atchison was reviewing the TUGCO training manual and noted that there was no program to certify TUGCO inspectors in nondestructive examinations such as magnetic particle (MT) or liquid penetrant (PT) tests. This raised a question in his

mind because EBASCO inspectors (who were under TUGCO's jurisdiction) had borrowed his liquid penetrant

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test kit to do these tests on a number of occasions. Atchison drafted an NCR (No. 361) stating that all MT and PT tests performed by these inspectors were invalid because they were not trained or certified to conduct them. He attached a note to Randy Smith asking for a "pow wow" on the NCR. Several days later when Smith discussed NCR 361 with Atchison, Smith said he was going to recommend voiding it, and Atchison had no objection. The NCR and the note were given to Brandt in a stack of papers that also contained Randy Smith's promotion recommendation for Atchison. This was the second time Brandt had seen the promotion recommendation.

Brandt interpreted NCR 361, accompanied by the "pow wow" note and the promotion request, as an attempt to gain leverage by Atchison to obtain a promotion. Brandt met with Ron Tolson, TUGCO site quality assurance supervisor and Gordon Purdy the Brown & Root site quality assurance manager, who agreed that Atchison was trying to use the nonconformance report as leverage to obtain a promotion. Brandt told Purdy he would not keep Atchison in his group and would transfer him back to Purdy immediately. Purdy tried to place Atchison with one of his quality assurance groups, but four managers whom he contacted refused to take Atchison. Purdy called Atchison in and told him he was being terminated for "inability to perform assigned tasks and failure to follow supervisory direction."

Discussion

There are two leading Supreme Court cases which, taken together, establish the overall framework for analyzing the evidence in a retaliatory adverse action case and allocating the respective burdens of production and burdens of persuasion of the parties. Under *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), plaintiff always bears the burden of proof that intentional discrimination occurred. If the employee carries that burden by a preponderance of the evidence, proving that his protected conduct was a motivating factor in the employer's action, the employer has the burden of proving, by a preponderance of the evidence, that it would have reached the same decision even in the absence of the protected conduct. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977); *Consolidated Edison Company of New York v. Donovan*, 673 F.2d 61 (2nd Cir. 1982)(applying *Mt. Healthy* to cases under 42 U.S.C. 5851). The ALJ correctly applied these principles

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to the facts of this case in a manner consistent with my previous decisions under 29 C.F.R. Part 24.

Under *Burdine*, the employee must initially present a prima facie case by showing that he engaged in protected conduct, that the employer was aware of that conduct and took some adverse action against him which was, more likely than not, the result of the protected conduct. At this point, the employer has the burden only of producing evidence that it was motivated by legitimate reasons. The employee then has an opportunity to prove either that the employer's proffered reason is a pretext, or that retaliation was one motivating factor among others. *Burdine, supra*, 450 U.S. 248, 254-256. On page nine of her opinion, the ALJ explicitly found that Atchison had made out a prima facie case that his protected activity was the likely reason for Brown & Root's action. She also held that all of Brown & Root's stated reasons for transferring Atchison out of the non-ASME inspection group and terminating him were not credible and were pretextual, and that the actions taken against him were caused solely by his protected activity of filing NRC's 296 and 361. Having found Brown & Root's reasons pretextual, it was unnecessary for the ALJ to consider whether Atchison would have been terminated in the absence of his protected activity because there was only one, improper, reason for Brown & Root's action.

If the employee proves by a preponderance of the evidence that protected activity was a motivating factor, the employee does not also have the burden, as suggested by Brown & Root, of proving that but for his protected activity he would not have been fired. A number of cases under other employee protection provisions, including the Occupational Safety and Health Act and the Federal Mine Safety and Health Act, have applied the *Mt. Healthy* prescription of burdens of proof where *dual* motives exist.[*]

The FLSA and OSHA cases cited by respondent are not to the contrary. In addition, there is little, if any, support in the record for a finding that Atchison acted in bad faith or unreasonably. Even if I were to hold, which I do not (see discussion of protected activity, infra), that filing NCR's is not a protected activity, that would not support a conclusion that Atchison acted in bad faith.

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One element of an employee's case under section 5851, of course, is to show that he engaged in protected activity. Filing nonconformance reports, which are the first step in identifying and resolving safety and quality problems, is clearly a form of protected activity under the ERA. Nuclear Regulatory Commission regulations require companies constructing nuclear power plants to establish quality assurance and quality control systems, including a program of quality inspection, and to report all deficiencies found in construction even if they have been corrected. See 10 C.F.R. Part 50, Appendix B, Part X, and 10 C.F.R. 50.55(e). Whether NCR's themselves do not have much significance in the quality control system, as asserted by Brown & Root, is immaterial to the legal question whether filing an NCR is protected activity. Respondent's quality control supervisor, Mr. Purdy, acknowledged that the internal quality control program in a nuclear power plant is one element of implementing the Energy Reorganization Act.

Under the employee protection provision of the Federal Mine Safety and Health Act, which was one of the models for section 5851, (see S. Rep. No. 95-848, reprinted in 1978 U.S. Code Cong. and Admin. News 7303), the District of Columbia Circuit has held that a miner is protected from retaliation for notifying his foreman or union safety committeeman of possible safety violations, even though he never contacted federal mine inspectors. *Phillips v. Department of Interior Board of Mine Appeals*, 500 F.2d 772 (D.C. Cir. 1974); *Baker v. Department of Interior Board of Mine Appeals*, 595 F.2d 746 (D.C. Cir. 1978). (See my discussion of these cases and the applicability of their rationale to section 5851 in *Mackowiak v. University Nuclear Systems, Inc.*, 82 ERA 8, April 29, 1983.)

Furthermore, I cannot agree with Brown & Root's assertion that section 5851 has a narrower scope than the employee protection provisions in OSHA and MSHA. Section 5851, it is true, does not include a phrase parallel to OSHA and MSHA protecting employees for the exercise of "any right afforded" by these acts. The ERA, unlike OSHA and MSHA, is not concerned with protection of employees, beyond that provided in section 5851 itself. However, section 5851 does contain a broad "catchall" provision protecting an employee for "assist[ing] or participat[ing]...in any other action to carry out the purposes of" the Act. Filing an NCR certainly is such an action (see discussion above).

I find Brown & Root's arguments based on textual analysis and

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rules of statutory construction unpersuasive, as are the twin spectres of the "flood of litigation" and undue interference in management prerogatives. If it were necessary to apply formal rules of statutory construction to language which seems clear on its face (see 2A Sutherland Statutory Construction, 4th Ed. 1973, §46.01), I think Brown & Root misapplies the rule of *ejusdem generis*. Its interpretation of the phrase "any other action" in section 5851(a) (3) would render that phrase itself meaningless, while reading the words "other action" with the following phrase, "to carry out the purposes of" the Act, is simple and straightforward. In applying the rule of *ejusdem generis*, "[w]here ... the specification of those objects classed as inferior is exhaustive and general words are added, then objects of a superior nature are embraced within the general words so as to prevent their rejection as surplusage." Sutherland Statutory Construction, supra, § 47.18. By specifying all the various means of participating or assisting in a formal proceeding, including assisting or participating "in any other manner" in a proceeding, Congress protected all activities connected with administration or enforcement proceedings and intended in the last phrase to do exactly what it said, protect any other conduct which carries out the purposes of the statute. Under Brown & Root's interpretation, an employee would not be protected, for example, if he were fired for talking informally with the NRC to find out what the Act requires, but not to initiate an investigation. While there may be some dispute in other cases about what conduct carries out the purposes of the Act, filing

an NCR under quality control programs mandated by statute and regulations clearly does so.

Brown & Root raises the twin spectres of a flood of litigation and undue interference in management prerogatives if filing an NCR will protect any incompetent or misbehaving employee. It will not. First, the employee must prove, *by a preponderance of the evidence*, that filing an NCR was a motivating factor in the adverse action, a considerable burden when the case involves an inspector who files NCR's all the time. Respondent will always have an opportunity to show that it had legitimate management reasons for its action and (if the employee carries his burden) would have taken the action anyway even if the NCR had not been filed. (See, e.g., *Mackowiak*, supra; *Dean Dartey v. Zack Company of Chicago*, 82 ERA 2, April 25, 1983.)

There is ample evidence in the record to support the ALJ's

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findings that Atchison made out a prima facie case that his protected activity was the likely reason for his transfer and discharge, and that Brown & Root did not meet that prima facie case because its proffered reasons were pretextual. Although I do not think it is necessary to restate here all the evidence which supports these findings, certain facts in the record and inferences reasonably flowing from them should be emphasized.

Atchison made out a prima facie case by showing he engaged in protected conduct (see discussion above) of which Brown & Root was aware and he was transferred and fired on the same day he filed NCR 361. Brown. & Root argues that Atchison's prima facie case as to his discharge by Purdy lacks the element of knowledge by Purdy about NCR 296. Of course, Purdy did know about NCR 361 and acted precipitously and without giving Atchison any chance to explain what he meant by it. Moreover, in these circumstances, Purdy can fairly be charged with constructive knowledge of NCR 296. In a whistleblower case under the Civil Service Reform Act, the District of Columbia Circuit, paraphrasing the employee's argument with approval, said that requiring direct knowledge by the final decision maker "conflicts with the purpose of the [statute] by permitting prohibited retaliation to be insulated by layers of bureaucratic 'ignorance'." *Frazier v. Merit Systems Protection Board*, 672 F.2d 150-166 (D.C. 1982). We agree with [the employees] ... that *constructive* knowledge of protected activities or the part of one with ultimate responsibility for a personnel action may support an inference of retaliatory intent." id. (Emphasis original) Moreover, Brandt's memo transferring Atchison, and Purdy's Counseling Report firing him, both suggest these actions were taken, at least in part, because Atchison reported defects outside his area of responsibility. At this point, Brown & Root had only to produce legitimate, nondiscriminatory reasons for its actions. This, the ALJ held, and I adopt that holding, it failed to do.

Complainant filed many NCR's before numbers 296 and 361, as Brown & Root points out, but the others apparently raised quality problems limited to the specific item

involved (e.g., No. M-82-00216, "Bolt failure during torque procedure-pipe whip restraint," reported on March 10, 1982). NCR's 296 and 361, however, as well as the "822 level" incident, raised questions with broad implications for the quality control program. NCR 296 revealed the poor quality of the work being done by CB&I, a major supplier,

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as well as the inadequacies of CB&I's preshipment inspections and TUGCO's inspections upon receipt of pipe whip restraints. Backfit or re-inspections of 56 CB&I pipe whip restraints had to be done and CB&I had to be called in to repair the defects found. The "822 level" incident raised similar questions, and NCR 361 would have called into question many inspections previously completed. (It would appear that the Atchison was raising in NCR 361, that official inspections may have been performed on non-ASME items by employees only trained for ASME inspections, was never answered. Responsibility for these inspections was formally assigned to Brown & Root non-ASME trained personnel, by the quality control manual, but Atchison was questioning whether other employees may have actually performed such inspections which were accepted as part of the official quality control system.)

Many of the reactions of Atchison's supervisors to these incidents are highly questionable in the circumstances and lend support to the ALJ's finding that the stated legitimate reasons for his transfer and discharge were pretextual. Mr. Brandt concluded that Atchison could not perform visual inspection of welds on the basis of the "822 level" incident in which Brandt himself said nothing could be conclusively determined until the paint was removed. Brandt's opinion at the time was that the porosity did not exceed permissible levels, but when the matter was finally resolved several months later, some rejectable porosity was found, although not as much as Atchison first indicated.

After the "822 level" incident, Atchison followed regular procedures to get guidance on what to do if he observed defects outside his assigned area of responsibility. He was instructed that he *should* report obvious defects, which he did on NCR 296. Randy Smith testified that applying the AWS porosity standard is a matter of judgment and that Atchison acted properly in reporting the NCR 296 defects. Yet, because not all of the defects he reported turned out to be unacceptable, later after careful, formal inspections, Brandt concluded Atchison was "continually" rejecting acceptable welds. I note that the log of NCR's filed during December 1981 to April 1982 shows a number of defects which were marked void as not being a violation or not being a nonconforming condition. Apparently, it was not unusual for a supervisor to disagree with an inspector's judgment. Randy Smith, Atchison's immediate supervisor, disagreed

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with Atchison's judgment on the "822 level" incident and some of the porosity indications on NCR 296, yet he rated Atchison highly, recommended him for promotion after these

incidents, and on his own initiative told Brandt that he disagreed with firing Atchison. Brandt asserts he was able on the basis of these incidents alone to make a judgment that Atchison was an incompetent visual inspector.

Brandt singled out Atchison as identifying too much porosity in connection with mapping the defects on NCR 296. But Atchison was only involved in the first map, not the second which Brandt also thought showed too much porosity. He reached this conclusion, moreover, because the pipe whip restraints had already been inspected several times, although he never looked at them carefully himself. He also was irritated about the mapping process taking so long, although he himself pointed out that these are large structures and every inch of every weld had to be inspected. Brandt himself had ordered the re-mapping; he also had to order a third inspection when he learned from CB&I that their contract permitted them to fabricate to ASME, rather that AWS, standards. Brandt acknowledged that he had been mistaken to order the mapping under AWS standards and that all the inspectors and supervisors involved were responsible for it taking so long, not just Atchison.

Brandt also claims he concluded Atchison's ability as a liquid penetrant inspector was questionable because, when Brandt looked at the welds at the 822 level which Atchison was supposed to be inspecting, Brandt thought they had been ground or "flapped" too much. One aspect of preparation of a weld for a liquid penetrant test where necessary is to grind the surface to remove irregularities that might interfere with the test. (See ASTM (American Society of Testing and Materials) E 165, Section 6.2 "Surface Conditioning Prior to Penetrant Inspection," cross referenced in AWS D1.1. However, one must be careful not to grind the weld too much which can close over the discontinuities for which one is testing (See ASTM Appendix A1.1.1.7)) There would appear to be some fairly difficult lines to draw here, yet Brandt claims he was able to conclude, without further investigation, that Atchison, who had just recently been tested and certified in Level II liquid penetrant examination, receiving a composite score of 93.4, was using improper technique. (Brandt's dismissal of all of Atchison's performance evaluations and inspection certificates as overinflated for pay purposes is

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not credible. It would call into question the good faith of at least four other supervisors who signed these documents.)

The parties vigorously dispute whether Atchison initiated and filed NCR 296 or simply signed his name to an NCR which Brandt ordered to be written. But Brandt knew that Atchison had initiated the process which led to NCR 296. When Brandt went to look at the pipe whip restraints he saw that some defects had been marked with a black marker. Brandt asked Randy Smith by whom and how the defects in CB&I welds, which were beyond his inspectors' scope of responsibility, had been identified. Smith told him that Atchison had been asked by a craft supervisor to look at the pipe whip restraints before they were installed.

The reactions of Brandt, Tolson and Purdy to NCR 361 and the "pow wow" note do not seem logical. They all say they interpreted the note as an attempt to use the NCR as leverage to obtain a promotion. But the note was addressed to Randy Smith who had already recommended Atchison for promotion and who himself had no authority to grant promotions. Randy Smith himself, did not interpret the note as an attempt to obtain a promotion. If Atchison intended to use the NCR as leverage, in order to get his point across, he would have been depending on the chance that Smith would send the note to Brandt, and the even more unlikely coincidence that Mike Foote would give Brandt the note, the NCR and the promotion recommendation together. None of them ever asked Atchison what he meant by the note, nor did they ask Smith what he thought Atchison was conveying by it. Brandt admitted that the evidence supporting his interpretation of the note was so slim he did not include it as a reason in his memo to Purdy transferring Atchison.

Both Brandt and Purdy gave varying, inconsistent explanations of the written reasons given for transferring and firing Atchison in documents written on that day. The ALJ's finding that these explanations are not credible is fully supported. Brandt's memo to Purdy said "Subject employee has been assigned responsibility of inspection of pipe whip restraint installation. Subject employee has demonstrated a lack of ability in performing assigned task, in that he refuses to limit his scope of responsibility to pipe whip restraints and insists on getting involved in other areas outside his scope. Consequently, his services are no longer required." On its face, this memo appears to base Brandt's action on Atchison's reporting of defects beyond

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his inspection responsibility. (Since Atchison was told that he *should* report such defects, this virtually amounts to an admission that a motivating factor in Brandt's action was Atchison's protected activity.) At the hearing, however, Brandt said what he meant by "getting involved in other areas outside his scope" was that Atchison was wandering all around the plant, talking a lot on the telephone, talking to other inspectors, "stirring" them up, trying to help them find other jobs, and generally not attending to his inspection duties. Brandt's basis for this at the time was flimsy at best. Brandt saw Atchison in his office with other inspectors, saw him on the telephone, overheard pieces of conversations in which others said Atchison was stirring things up, and saw Atchison in various locations around the plant for what Brandt thought was nonbusiness activity. Brandt could not see how Atchison would have the time to review the TUGCO training manual when he was the only pipe whip restraint installation inspector. But if Atchison was the only such inspector, and, as he testified before the NRC, he had from 8-13 crews' work to inspect, it would be understandable that he was in many different areas and that craft supervisors sometimes could not get inspections done right away. Brandt never made any efforts to verify that Atchison was conducting personal business during working hours, or that his phone calls and meetings with other inspectors were non-work-related. No evidence was presented to corroborate Brandt's assertion that Atchison was "stirring up" the other inspectors, and acting as "placement officer" to find them other jobs.

Brandt attempted to interpret the language of his memo to include Atchison's deficiencies as an inspector (perceived by Brandt). Brandt claimed that "lack of ability in performing assigned task" meant inability to perform visual inspections which Brandt had observed in connection with the "822 level" and NCR 296 incidents. Yet Brandt admitted that he would not have fired Atchison for the "822 level" and NCR 296 incidents, though he was leaning in that direction. Brandt claims that he could conclude on the basis of these incidents that Atchison was incompetent. But he would have been going contrary to the judgment of Atchison's supervisor, who observed his work every day, and the instructors who had given Atchison high marks on formal tests which included practical application of knowledge of testing procedures.

At different points in his testimony, Purdy gave different

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reasons as the basic reason for firing Atchison. At one point, he said the reason was Atchison's refusal to limit the scope of inspections; later he said it was poor technical proficiency. Yet the only matter discussed on April 12 among Purdy, Tolson and Brandt was the "pow wow" note. As the ALJ pointed out, if Purdy were firing Atchison in part for incompetent performance, he could be expected to more carefully investigate Brandt's evaluation of Atchison. When Atchison worked in Purdy's group before being transferred to Brandt's group, his supervisor, Richard Ice, rated him as an efficient, very thorough inspector.

He had scored high in all his tests and been rated excellent or outstanding by his supervisor under Brandt, Randy Smith. Indeed, Mike Foote, who was Randy Smith's supervisor and reported to Brandt, had gone to Purdy before April 12, 1982 to try to get Purdy to convince Brandt to promote Atchison. All these facts support the ALJ's conclusion that Purdy's reasons for his inability to place Atchison in his group and discharging Atchison were not credible and were pretextual. With respect to Purdy's claimed inability to place Atchison after Brandt transferred him, Richard Ice testified that he had an outstanding request for an additional inspector and would have accepted Atchison. Moreover, Purdy never explained why he could order Brandt to take Atchison originally, but could not stop Brandt from transferring Atchison back less than two months later. Complainant therefore has proven that Brown & Root violated 42 U.S.C. 5851 when it transferred and fired him.

I cannot agree, however, with the ALJ's recommendation that Atchison should be reinstated to his former position and that Brown & Root's actual knowledge of Atchison's misrepresentations about his background should not act as a cut-off date for back pay. The ALJ emphasized that the warning on the application form is conditional. But use of the conditional [EDITOR'S NOTE: Next word is illegible] "may may be cause for... dismissal" on the application form only seems intended to provide flexibility so that dismissal would not be required in all cases for minor inconsistencies or misstatements. Similarly, when asked what would happen to an employee who falsified his education,

Purdy's qualification of his response, saying "the employee would probably have been terminated" only indicates caution on his part not to make a blanket statement. Purdy's comment was that falsifying documents is "probably the most significant deficiency" with which a quality control inspector can be charged. Moreover, since this case involves

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whether Atchison should have been reinstated since his discharge in 1982, or whether June 1982 should be a cut off date for back pay, Brown & Root's personnel practices in 1980 are not particularly relevant. More relevant is Purdy's uncontradicted and unrebutted testimony that another employee was forced to resign for falsification of an application form shortly before Atchison was fired. In comparable situations, courts and agencies have upheld the discharge, or have refused to order the reinstatement of, employees who have falsified information about their reinstatement See *Tube Turns, A Division of Chemetron Corp.*, 260 NLRB No. 82, March 1, 1982, 109 LRRM 1200; *NLRB v. Huntington Hospital Inc.*, 550 F.2d 921 (4th Cir. 1977). Atchison's transgression was not limited, as he suggests, to the act, "remote in time," of falsifying the application. He repeated the misrepresentation each time he was evaluated or certified for NDE testing procedures, including the promotion recommendation which he solicited from Randy Smith in April, 1982. In *Chemetron Corp.*, supra, a very similar case in which an employee misrepresented his background on his application and later forged cards to show that he had taken certain courses, the NLRB held that the employer was justified in firing him even though ho, was a competent worker.

The ALJ implies that Brown & Root should be estopped from taking action on Atchison's misrepresentation because it had in its possession since 1980 an unaltered copy of a response from Tarrant County Junior College showing that Atchison did not receive a degree. Brown & Root received this information in response to a routine inquiry, and there is no indication that it was ever seen or consciously disregarded by management officials. It seems clear that Brown & Root would have terminated Atchison as soon as they discovered his misrepresentation even if he had not engaged in protected activity. Filing a complaint under the ERA, and even proof that the firing itself was improperly motivated, should not insulate him from other, legitimate, management actions. Therefore, I do not think it would be appropriate, under my authority to order affirmative action to abate a violation found (29 C.F.R. 24.6(b)(2)), to require reinstatement of an employee who repeatedly misrepresented material facts about his background, or to order back pay beyond the date of discovery of the misrepresentation.

Therefore, Brown & Root is ORDERED:

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1. To pay complainant Charles A. Atchison back pay from April 12, 1982 to June 15, 1982, less interim earnings and all legal deductions;

2. To pay to complainant's counsel, Kenneth J. Mighell, the amount of $7,875.00 for fees and expenses.

3. To remove all reference to complainant's April 12, 1982 termination from his personnel files.

RAYMOND J. DONOVAN
Secretary of Labor

Dated at Washington, D.C.
June 10, 1983.

[ENDNOTES]

[*] *Wright-Line, A Division of Wright Line, Inc.*, 251 NLRB 1083, enforced 662 F.2d 899, cert. denied, No. 81-987 (March 1, 1982)(National Labor Relations Act); *Marshall v. Commonwealth Aquarium*, 469 F.Supp. 690 (D. Mass 1979)(Occupational Safety and Health Act); *Pasula v. Consolidated Coal Co.*, 2 MSHC 1001 (1980), rev'd on other grounds, 663 F.2d 1211 (3rd Cir. 1981)(Federal Mine Safety and Health Act).